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No. 95-883

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THE WEST OF ENGLAND SHIP OWNERS
MUTUAL PROTECTION AND INDEMNITY ASSOCIATION
(Luxembourg),
Petitioner,

v.

STEPHEN J. MOREWITZ,
as administrator, etc.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. THE ELEVENTH CIRCUIT'S RULING THAT APPELLATE COURTS MAY REVIEW § 3 STAY ORDERS FAVORING ARBITRATION BEFORE ARBITRATION GOES FORWARD IS IN CONFLICT WITH THE FEDERAL ARBITRATION ACT AND THE TENTH, SEVENTH AND FOURTH CIRCUITS

The crucial proposition of law embodied in the first question for review is that, in accordance with this Court's mandates that arbitration agreements be enforced as written, " '§ 16 [9 U.S.C.] generally precludes appellate review of orders that favor arbitration over litigation "until after the arbitration has gone forward to a final award." ' " *American Casualty Co. v. L-J, Inc.*, 35 F.3d 133, 135

(4th Cir. 1994) (quoting *Stedor v. Armtex, Inc.*, 947 F.2d 127, 730 (4th Cir. 1991) (quoting Siegel, *Practice Commentary*, 9 U.S.C.A. § 16, at p. 219 (West Supp. 1991))). As demonstrated in our Petition, this is the law of the Fourth, Seventh and Tenth Circuits but not the law of the Eleventh Circuit.

The Eleventh Circuit ruled in this case that under § 3 of the Arbitration Act a party ordered by a district court to arbitrate his dispute may obtain appellate review of that pro-arbitration order without first engaging in the arbitration prescribed by that order. The Tenth, Seventh, and Fourth Circuits hold to the contrary thus creating a conflict among the Circuit Courts of Appeal.

Respondent has failed in his efforts to demonstrate that no conflict among these circuits exists on this important question. Indeed, nowhere does the Respondent address the underlying federal policy favoring the enforcement of arbitration agreements or even attempt to reconcile the Eleventh Circuit's ruling with this policy. In *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford, Junior Univ.*, this Court explained that the passage of the Act "was motivated, first and foremost, by a Congressional desire to enforce arbitration agreements into which parties had entered." 489 U.S. 467, 478 (1989) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985)). And in *Scherck v. Alberto Culver*, this Court made it clear that Congress intended to place arbitration agreements "upon the same footing as other contracts." 417 U.S. 506, 511 (1974). As a result, courts are to "rigorously enforce agreements to arbitrate." *Byrd*, 470 U.S. at 221. The Petition, therefore, demonstrates an obvious conflict between the Eleventh Circuit's decision here and the decisions of other circuits which follow the federal policy set forth in the Federal Arbitration Act, a conflict which was nowhere addressed by the Respondent in his brief.

Furthermore, no explanation is offered by the Respondent of how the exercise of appellate review over an order

under § 3 favoring arbitration before arbitration is had is not in conflict with the decisions of the Tenth, Seventh and Fourth Circuits. In *Adair Bus Sales, Inc. v. Bluebird Corp.*, 25 F.3d 953 (10th 1994), for example, the Tenth Circuit was confronted with the precise question which the Eleventh Circuit addressed in this case. The Tenth Circuit in *Adair* concluded that the Arbitration Act prohibited appellate review of a stay order which had been brought to it before arbitration had gone forward. 25 F.3d at 955. The Eleventh Circuit ruled in this case that the Arbitration Act did not prohibit appellate review under these circumstances. This Petition presents an important question of appellate practice under § 16 of the Federal Arbitration Act. This is a question which has never been posed to this Court and over which there is a clear conflict among the circuits. Respondent's argument that the conflict is merely a product of "different facts" is entirely unresponsive and offers nothing to the study of this important issue.

Furthermore, Respondent's treatment of *State Establishment for Agric. Prod. Trading v. WESERMUNDE*, 838 F.2d 1576, 1579 (11th Cir.), *cert. denied*, 48 U.S. 916 (1988) actually highlights the conflict. *State Establishment*, as noted in the Petition, was decided before § 16 was enacted. Nevertheless the Eleventh Circuit, oblivious to § 16, relied on State Establishment in its exercise of appellate review over the arbitration order before the ordered arbitration was had, notwithstanding that the forgotten section of the Act prohibited review under these circumstances. Section 16 of the Act provides that there is no appeal from a § 3 order favoring arbitration. Section 3 provides that a trial court "shall . . . stay the trial of the action *until such arbitration has been had* in accordance with the terms of the agreement . . . ." (Emphasis added). The Tenth, Seventh and Fourth Circuits have relied on these sections in arriving at a conclusion in conflict with that of the Eleventh Circuit. The fact that the Eleventh Circuit relied on *State Establish-*

ment, rather than on §§ 3 and 16 of the Act, frames the existing conflict so obviously in need of resolution by this Court.

II. RESPONDENT'S ARGUMENT AS TO THE FINDING OF WAIVER MISCHARACTERIZES THE PETITION AND IS UNRESPONSIVE

Respondent has also failed to show how the Eleventh Circuit's opinion in this case—that there was waiver of a right to arbitration by Petitioner by reason of acts done (or not done) six years before this suit was instituted—is not in conflict with the law of other circuits. Again, the Respondent has not even attempted to reconcile the pre-litigation waiver rule of the Eleventh Circuit with the overriding policy of the Arbitration Act.

Of particular note is the absence of any discussion of *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat. Oil*, 767 F.2d 1140 (5th Cir. 1985) in Respondent's opposition. With essentially identical facts, the Fifth Circuit in *Sedco, Inc.* arrived at an altogether contrary conclusion. Again, there is a conflict among the circuits which cannot be explained away by Respondent's declaring "different facts."

III. RESPONDENT'S ARGUMENT THAT NO CONFLICT EXISTS BETWEEN THE ELEVENTH CIRCUIT AND THE SECOND AND FIFTH CIRCUITS REGARDING FORUM DIRECT ACTION STATUTES IS WITHOUT MERIT

The final question presented for review in the Petition is a wholly legal one: Are forum direct action statutes to be applied automatically by federal courts in admiralty actions without regard to choice of law analysis? The Eleventh Circuit answered in the affirmative. The Second and Fifth Circuits answered in the negative.

There is nothing in Respondent's opposition which illustrates an absence of conflict on this important question.

Indeed, the Respondent simply ignores that the Second Circuit in *State Trading Corp. v. Assuranceforeningen Skuld* stated expressly that it was in conflict with the Eleventh Circuit over this question. 921 F.2d 409, 415 (2d Cir. 1990).

District courts in the Eleventh Circuit will now apply forum direct action statutes automatically and without regard to choice of law rules. District courts in the Second and Fifth Circuits will not. The Respondent has not demonstrated otherwise.

Notwithstanding his position that Alabama's direct action statutes were properly applied as forum procedural devices, Respondent notes forum contacts which purportedly otherwise support the result of the Eleventh Circuit ruling. Respondent asserts various negligent acts which are supposed to have occurred in Mobile. (Respondent's brief, p. 25). But the suit for liability for negligence proceeded to judgment in the Eastern District of Virginia over 15 years ago and what was done or not done in Mobile is wholly irrelevant to the question of what law should govern the terms of the contract. Thus the instant suit has nothing at all to do with negligence or unseaworthiness of the vessel. Rather, it is, as the Respondent has repeatedly argued, a suit on a marine insurance contract. (App. F, 36a). None of the contacts noted by Respondent are relevant to the formation or execution of the subject contract. The contract on which this suit is based was issued by a Luxembourg corporation through London agents to a Cypriot corporation on a Cypriot-flagged vessel and requires arbitration in England and application of English law. As the Respondent has conceded, "the reason the action was filed in [Alabama] rather than in [Virginia], is that Virginia's long-arm statute affords the plaintiff no relief; whereas, Alabama's long-arm statute is much broader than that of Virginia." (App. G, 55a n.2).

CONCLUSION

Respondent's opposition is unresponsive and belies the conflicts created by the Eleventh Circuit's decision. The questions presented in the Petition involve conflicts concerning crucial aspects of the Federal Arbitration Act and the overriding federal policy it is intended to affect, and uniformity of the admiralty law. The Petition should be granted for the reasons set forth therein.

Respectfully submitted,

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